

Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees

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I. INTRODUCTION

Increasingly, the language an employee may speak is a source of conflict in America's workplaces. In the past four years, the number of complaints filed with the Equal Employment Opportunity Commission ("EEOC") against companies implementing English-only policies has risen exponentially.¹

This trend is expected to continue for a number of reasons. First, civil rights groups report an increase in complaints following state and municipal voter initiatives that declare English as the official language in a jurisdiction ("Official English" laws).² Additionally, the EEOC has indicated that "claims of . . . discrimination involving language issues" are an "enforcement priority" for the agency,³ and consequently, it has instituted an agency-wide initiative that recognizes certain language-minority groups as needing more of their at-

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1. The EEOC reports a 500% increase in the four years since they began to keep track of such complaints. The EEOC is the Federal Agency charged with investigating employment discrimination claims under Title VII of the Civil Rights Act of 1964. See Maria Shim, *English-Only Cases Multiply*, NAT'L L.J., Oct. 23, 2000, at B1.

2. See Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language, Law, Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 153 (1997). There is some evidence that this increase in the number of complaints may be driven by employers' increased willingness to implement English-only workplace rules following or even prior to highly-publicized "Official English" voter initiative campaigns. See, e.g., *id.*, (discussing employer practices in California in the aftermath of California's English language initiative, Proposition 63); BILL PIATT, ¿ONLY ENGLISH? 168 (1990); RAYMOND TATALOVICH, NATIVISM REBORN? 140 (1995) (discussing employer practices in Arizona prior to adoption of its English-only ballot initiative, Proposition 106). Alternatively, following any high-profile English-only campaign, workers may also be more sensitive to such rules and more knowledgeable of their rights. Twenty-two states have made English their official language, most since the English-only movement gained force in the mid-1980's. See Linda Greenhouse, *Supreme Court Roundup: Appeal to Save English-Only Law Fails*, N.Y. TIMES, Jan. 12, 1999, at A16.

3. See EEOC Compl. Man. (BNA) No. 209 at N:3061 (laying out the 1996 EEOC National Enforcement Plan for the administrative enforcement and litigation of the laws within the EEOC's jurisdiction).

tention.⁴

Undoubtedly, though, the most significant source of increased language conflict in the workplace is the substantial growth in the national labor force of ethnic groups whose "primary language" is not English.⁵ For instance, the 1990 Census revealed that the largest ethnic language-minority groups in the United States had grown substantially over the previous decade.⁶ That trend is continuing, as preliminary data from the millennial Census indicates that the ratio of Americans whose primary language is not English increased from one in seven in 1990 to nearly one in five in 2000.⁷ In California, forty percent of families use a foreign language as their primary mode of communication in their homes.⁸ Moreover, this trend is not expected to reverse itself in the near future.⁹ Consequently, Americans can expect continued tension over restrictions on language use in the workplace as the country becomes increasingly ethnically and linguistically diverse.¹⁰

The uncertain state of the law concerning English-only workplace rules is further exacerbating the situation. Because neither the Supreme Court nor Congress has addressed the legality of English-only workplace rules,¹¹ the lower

4. See Shim, *supra* note 1, at B1 (describing the EEOC's outreach efforts to Asian and Latino groups, in complying with the directives of its National Enforcement Plan).

5. See S. Craig Moore, *English-Only Rules in the Workplace*, 15 LAB. LAW. 295, 295 (1999). According to the Federal Government, "[p]ersons whose mother tongue [primary language] is not English" refers to persons "[w]ho normally use languages other than English, or who live in households where languages other than English are spoken." Guidelines on Discrimination Because of National Origin; Proposed Revision, 45 Fed. Reg. 62,728, 62,728 (Sept. 19, 1980).

6. See Edward M. Chen, *Garcia v. Spun Steak Co.: Speak-English-Only Rules and the Demise of Workplace Pluralism*, 1 ASIAN L.J. 155, 157 (1994) (reporting that the growth included 17,340,000 Spanish speakers (56.0% increase), 1,319,000 speakers of Chinese languages (109.2% increase), 899,000 speakers of Filipino languages (89.5% increase), 644,000 speakers of Asian Indian languages (164.8% increase), 626,000 Korean speakers (135.3% increase), and 713,000 speakers of Vietnamese, Thai, and Laotian languages (154.6% increase)).

7. Compare Eric Schmitt, *Census Data Show a Sharp Increase in Living Standard*, N.Y. TIMES, Aug. 6, 2001, at A1 (reporting that approximately 18% of all residents who are at least five years old, or 45 million Americans, do not speak English in the home), with Chen, *supra* note 6, at 157 (reporting that approximately 14% of Americans, or 39 million people, indicated that they use a language other than English in the home on the 1990 Census). See generally U.S. Department of Commerce, *American Community Survey*, at <http://www.census.gov/dmd/www/databank.html>.

8. See Schmitt, *supra* note 7, at A1.

9. See Moore, *supra* note 5, at 295 n.3 (reporting that the number of Hispanics in the labor force is projected to grow by more than 4.6 million by the year 2006, and that the Asian and Pacific Islander labor force participation rate will increase by 41% by 2006).

10. See *Garcia v. Spun Steak Co.*, 13 F.3d 296, 296 (9th Cir. 1993) (Reinhardt, J., dissenting) (noting that "[t]he growth of the immigrant population and the present mood of anti-immigrant backlash mean that English-only rules are likely to become more prevalent"). Within the past eighteen months, the EEOC has reported both the largest judgment for monetary damages (\$192,000) ever rendered against an employer for an English-only rule, *Employer's English-Only Policy Brings a Settlement of \$192,000*, N.Y. TIMES, Sept. 2, 2000, at A12, as well as the largest cash settlement (\$2.44 million) ever secured from an employer for an English-only rule, see Associated Press, *Housekeepers Told to Speak Only English Get Settlement*, N.Y. TIMES, Apr. 22, 2001 at A24.

11. But see *infra* notes 244-245 and accompanying text (explaining how Congress briefly discussed the EEOC's Guidelines for English-only Workplace Rules while amending Title VII of the 1991 Civil Rights Act).

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courts and the EEOC have exercised broad discretion in deciding this issue.¹² In 1980, the EEOC amended its Guidelines on Discrimination Because of National Origin (the “Guidelines”)¹³ to identify English-only workplace rules as a form of national origin discrimination and to include a presumption that such rules have a discriminatory impact on national origin groups.¹⁴ Since then, the Ninth Circuit has been the only federal appellate court to directly address the issue of an employer’s English-only workplace rule,¹⁵ and it has issued opinions both specifically supporting and specifically rejecting the EEOC’s Guidelines.¹⁶

This Note will demonstrate how the analysis in the leading cases misinterprets or ignores important nuances within the bilingual population. The leading federal appellate court decisions on English-only workplace rules have set up a false dichotomy by distinguishing “fully” bilingual from monolingual national origin minorities, including in the latter group those plaintiffs with limited English-language proficiency.¹⁷ I will explain how these cases have understated the discriminatory impact of English-only workplace rules on all national origin language minorities, particularly those that the leading cases describe as fully bilingual. I will also show how the EEOC’s Guidelines on National Origin Discrimination—demonstrating a truer understanding of language practices among bilingual national origin minorities—more accurately fulfill Congress’ objective to eliminate discriminatory workplace practices than does the analysis of the leading cases. The Note concludes by suggesting some benefits that would

12. See Lisa L. Behm, Comment, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 580 (1998).

13. See 29 C.F.R. § 1606 (2001). The Guidelines include discrimination based on “linguistic characteristics” as a subset of national origin discrimination.

14. See 29 C.F.R. § 1606.7 (2001). The EEOC’s action was most likely in response to the first federal appellate court ruling, issued earlier that same year, upholding an employer’s English-only workplace restriction. See *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). The *Gloor* court made specific mention that it was ruling in the absence of any guidance from the EEOC. *Id.* at 269.

15. The Fourth and Eleventh Circuits have issued unpublished opinions affirming decisions of their own District Courts. See *Long v. First Union Corp.*, 86 F.3d 1151 (4th Cir. 1996), *aff’d* 894 F. Supp. 933 (E.D. Va. 1995); *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir. 1993), *cert. denied*, 508 U.S. 910 (1993).

16. Compare *Gutierrez v. Mun. Court*, 838 F.2d 1031, 1039 n.7 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989) (citing the EEOC Guidelines approvingly and noting that “[the] guidelines are generally entitled to considerable deference so long as they are not inconsistent with Congressional intent”), with *Spun Steak v. Garcia*, 998 F.2d 1480, 1489 (9th Cir. 1993), *reh’g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (noting that “[n]othing in the plain language of [Title VII]’s proscription of discriminatory practices in the workplace] supports EEOC’s English-only rule” and “[w]e will not defer to an administrative construction of a statute where there are ‘compelling indications that it is wrong’”). Furthermore, since *Spun Steak* runs contrary to stated EEOC policy and is now the leading case in the Ninth Circuit, the EEOC is faced with the conundrum of providing different levels of protection to employees in different regions of the country. This discrepancy has widespread implications since the Ninth Circuit has the largest number of residents with non-English language backgrounds. See *Chen*, *supra* note 6, at 159.

17. See *Spun Steak*, 998 F.2d at 1487; *Gloor*, 618 F.2d at 270.

follow from the adoption of the Guidelines by the federal circuits.

In my analysis, I focus at certain times on Spanish-speaking language minorities. This is for a number of reasons: Spanish-speaking minorities are by far the largest language minority group in the United States;¹⁸ many Spanish-language minority groups have experienced a history of discrimination, at least in part because of their language;¹⁹ and Spanish-language plaintiffs make up the large majority of the case law concerning bilingual employees and English-only Workplace Rules.²⁰ However, most, if not all, of the analysis applies to other bilingual language minorities.²¹

II. THE ISSUES

A. *Defining National Origin Discrimination Under Title VII: Vague (Congressional) Intent, Minimal (Judicial) Guidance*

Currently, no federal statute specifically prohibits employers from adopting English-only workplace rules.²² The EEOC and individual plaintiffs have sued employers under Title VII of the Civil Rights Act of 1964,²³ which forbids private employers from discriminating on the basis of national origin, among other characteristics.²⁴ The Supreme Court has found that the purpose of the Act was to "assure equality of employment opportunities and to *eliminate those dis-*

18. Chen, *supra* note 6, and accompanying text.

19. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) (finding that Mexican-Americans in Texas constituted a protected class with the characteristics of a discrete and insular minority, for purposes of Equal Protection analysis); Alfredo Mirandé, "En la Tierra del Ciego, El Tuerto es Rey" ("In the Land of the Blind, the One Eyed Person is King"): *Bilingualism as a Disability*, 26 N.M. L. REV. 75 (1996) (noting that Spanish-speaking ability has been historically devalued in the United States, e.g., "No Spanish" rules were the norm in schools throughout the Southwest until the 1960's and "Spanish detention" was a widely used punishment in the schools).

20. See, e.g., Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 266 n.8 (1990) (finding that, at that time, "[a]pparently all of the [English-only in the workplace] cases . . . decided by the courts and the Equal Employment Opportunity Commission [had] involved Spanish-speaking employees").

21. See generally Chen, *supra* note 6, at 159 (noting that a number of recent cases have been brought by Asian and Pacific Islander employees).

22. *Employer's English-Only Policy Brings a Settlement of \$192,500*, N.Y. TIMES, Sept. 2, 2000, at A12.

23. 42 U.S.C. § 2000e (1994).

24. The EEOC is charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, and is expressly authorized to bring suit under § 706(a) of Title VII. See 42 U.S.C. § 2000e-5(a). Title VII states, in pertinent part, that

[I]t shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual employee of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. at § 2000e-2.

criminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”²⁵ Furthermore, the Court has instructed that the language of Title VII should be interpreted broadly, “to strike at the entire spectrum of discriminatory treatment.”²⁶

However, Title VII does not expressly prohibit discrimination on the basis of language, and disagreements about the connection between language and national origin have hobbled plaintiffs challenging English-only rules.²⁷ Unfortunately, there is very little legislative history regarding Congress’ intent in including national origin in Title VII as a proscribed category.²⁸ Two members of Congress did attempt, in rather conclusory fashion, to explain what Congress meant by including national origin in the Act. Congressman Roosevelt, one of the bill’s sponsors, offered that “[national origin] means national. It means the country from which you or your forbears came from (sic).”²⁹ Congressman Dent offered what national origin is not: “National origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person.”³⁰ However, Title VII’s legislative history offers no guidance regarding employment practices aimed at underlying personal characteristics, including language, that are often closely associated with national origin.³¹

The Supreme Court has never discussed employment discrimination based

25. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

26. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

27. See, e.g., *Gloor*, 618 F.2d at 268 (determining that “[n]either [Title VII] nor common understanding equates national origin with the language that one chooses to speak” and denying plaintiff’s claim for relief); *Spun Steak*, 998 F.2d at 1488 (finding that “Title VII is not meant to protect against rules that merely inconvenience some employees [by prohibiting them from using the language with which they are most comfortable] even if the inconvenience falls regularly on a protected class”).

28. See, e.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973) (considering the comments about national origin discrimination made during the House debate and characterizing the legislative history as “quite meager”); see also Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994). Professor Perea offers substantial evidence that the paucity of discussion of the other proscribed categories is because “Congress’ principal purpose in enacting Title VII . . . was to prohibit employment discrimination because of race or color.” *Id.* at 806; see also *id.* at 806 n.6 (quoting Congressman Celler, one of the bill’s chief sponsors, stating that “you must remember that the basic purpose of Title VII is to prohibit discrimination . . . on the basis of race or color.”), citing 110 CONG. REC. 2556 (1964). Professor Perea’s analysis of Title VII’s legislative history yields the conclusion that “at the time, Congress gave no serious consideration to the content of the national origin term nor to its proper scope.”

29. 110 CONG. REC. 2549 (1964) (statement of Rep. Roosevelt).

30. *Id.* at 2561 (statement of Rep. Dent).

31. A number of commentators have pointed out that ethnic traits and personal characteristics are often more accurate predictors of prejudicial behavior than a person’s national origin. See, e.g., Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1165 (1985) (“Differences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the [national] origin itself.”); Perea, *supra* note 28, at 833-34 (explaining that “[ethnic] traits . . . engender a perception of group distinctiveness in persons who are not members of that group. It is the perception of difference, often based on ethnic traits, that results in discrimination”). See also notes 166-67 and accompanying text for further discussion.

upon language.³² Furthermore, in its only ruling defining national origin under Title VII, the Court simply adopted Congressman Roosevelt's vague definition, without elaborating on the composition of national origin discrimination.³³ In that decision, the Court held that an employer's citizenship requirement was not discrimination based upon national origin, as Congress intended to use the term, and therefore not protected under Title VII.³⁴

However, lower federal courts have construed "national origin" broadly, to include at least some underlying personal characteristics, such as accent and height, that are often highly correlated with national origin.³⁵ The lower courts have also extended Congressman Roosevelt's basic description of national origin to find that Congress intended to include persons without any specific national affiliation, but sharing a common ancestry, heritage, or background.³⁶

For our purposes, it is important to note that, while the legislative history is meager, Congressman Roosevelt's accepted definition of "national origin" actually extends the term beyond its normal meaning. Although one's own national origin, in a strict sense, means the country that you came from, Congressman Roosevelt conflated the term with ancestry when he included discrimination based upon the national origin of one's ancestors.³⁷

B. *Proof of Workplace Discrimination Based on National Origin*

The Supreme Court recognizes two distinct theories of liability under which

32. See Perea, *supra* note 28, at 820.

33. *Espinoza*, 414 U.S. at 88 (concluding that "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came").

34. *Id.* at 94. The *Espinoza* court was strongly influenced by the fact that the federal government had imposed a citizenship requirement in its own hiring practices. Therefore, Justice Marshall reasoned, it would have been contradictory for Congress to have intended to prohibit private employers from discriminating on the basis of citizenship while allowing the Federal government to do so. The ruling is somewhat restricted in this sense.

35. See *Fragante v. Honolulu*, 888 F.2d 591, 599 (9th Cir. 1989), *cert. denied.*, 494 U.S. 1081 (1990) (holding, in an employment discrimination case based on national origin, that an employer may lawfully base an employment decision upon an individual's accent, but only when it interferes materially with job performance); *Carino v. Univ. of Oklahoma Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (finding evidence that an employee in a university dental laboratory was demoted on the basis of his accent sufficient to establish discriminatory intent based on national origin); *Berke v. Ohio Dep't. of Pub. Welfare*, 628 F.2d 980 (6th Cir. 1980) (*per curiam*) (affirming district court finding of national origin discrimination where the plaintiff was denied two positions in State Department of Welfare because of her accent). See also *Davis v. Los Angeles County*, 566 F.2d 1334, 1341-42 (9th Cir. 1977) (holding minimum height requirement for firemen had a disparate impact on Mexican-Americans and was not proven to be job related); *Officers for Justice v. Civil Serv. Comm'n*, 395 F. Supp. 378, 380-81 (N.D. Cal. 1975) (holding minimum height restriction for police officers had a disparate impact on Hispanics, Asians, and women).

36. BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 356 (3d ed. 1996) (citing cases of Acadians, Gypsies, Ukrainians and Serbians who were all extended "national origin" status).

37. Ancestry is defined as "family descent or lineage," characteristics which may be independent of national origin. See WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 50 (2d coll. ed. 1982). Therefore, one could have ancestors from two or more different countries. However, one's own national origin can only be, in the strict sense, the single nation from which one originated.

a plaintiff may show employment discrimination on the basis of national origin under Title VII—disparate treatment and disparate impact.³⁸ Both theories involve an evidentiary burden-shifting framework between the parties.³⁹ Under either theory, the initial burden is on the plaintiff to establish a *prima facie* case of discrimination.⁴⁰

1. *Disparate Treatment Theory*

Disparate treatment was “undoubtedly the most obvious evil Congress had in mind when it enacted Title VII.”⁴¹ Under a claim alleging disparate treatment in the workplace, the “central question is always whether the defendant’s actions were motivated by discriminatory intent.”⁴² A plaintiff may make out a *prima facie* case of an employer’s intentional discrimination by presenting either direct or circumstantial evidence.⁴³ Circumstantial evidence allows a plaintiff to satisfy her initial burden of proving intentional discrimination simply by offering sufficient evidence to give rise to an inference of discriminatory animus.⁴⁴ The burden then shifts to the employer to prove that it had a legitimate, nondiscriminatory reason for its actions.⁴⁵ Finally, the plaintiff may respond with proof that the employer’s articulated reason was a pretext to mask unlawful discrimination.⁴⁶

Many commentators have pointed out that challenges to English-only rules using a disparate treatment theory are rare, largely because the theory’s intent requirement is negated by the fact that English-only rules appear facially neutral; they require that all employees speak English.⁴⁷ However, two recent district court cases used disparate treatment analysis to find an employer liable for intentionally discriminating against its employees, where an English-only rule was imposed at all times while the employees were on the work premises.⁴⁸

38. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988).

39. See LINDEMANN & GROSSMAN, *supra* note 36, at 3-4.

40. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

41. *Int. Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

42. LINDEMANN & GROSSMAN, *supra* note 36, at 10-11.

43. *Id.* at 11.

44. *McDonnell Douglas Corp.*, 411 U.S. 792 (1973); see also *Texas Dep’t. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (finding that “the burden of establishing a *prima facie* case of disparate treatment is not onerous”).

45. *McDonnell Douglas Corp.*, 411 U.S. at 802.

46. *Id.* at 804.

47. See, e.g., Rachel L. Adams, *English-Only in the Workplace: A New Judicial Lens Will Provide More Comprehensive Title VII Protection*, 47 CATH. U. L. REV. 1327, 1339-40 (1998) (explaining that *Jurado v. Eleven-Fifty Co.*, 813 F.2d 1406 (9th Cir. 1987), is the only circuit court decision to analyze a Title VII challenge to an English-only workplace rule under disparate treatment theory).

48. *EEOC v. Premier Operator Services*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000); *EEOC v. Synchro-Start-Products, Inc.*, 29 F. Supp. 2d 911 (N.D. Ill. 1999). See Subsection II.D.3 *infra* for a discussion of these cases.

2. *Disparate Impact Theory*

Most claims against an employer's English-only workplace rule are brought under a disparate impact theory.⁴⁹ Illicit motive or intent is irrelevant because "impact analysis is designed to implement Congressional concern with 'the consequences of employment practices, not simply the motivation.'"⁵⁰ Traditional disparate impact analysis in Title VII cases was originally established in *Griggs v. Duke Power Co.*,⁵¹ where the Supreme Court found that Title VII proscribed "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation."⁵² The Court further refined its disparate impact analysis in *Albemarle Paper Co. v. Moody*.⁵³ Under a *Griggs-Albemarle* analysis, a plaintiff meets her initial evidentiary burden by making out a *prima facie* case of discriminatory impact.⁵⁴ This requires the plaintiffs first prove that an employer's policy that is neutral on its face nevertheless has a disproportionate impact on members of protected minority groups.⁵⁵ In addition, the plaintiff must show that the practice in question caused the disparity, and that the disparate impact was both significant and adverse.⁵⁶

It is important for our purposes to note that the *prima facie* showing required of the plaintiff in a disparate impact case is a higher standard than is required in a disparate treatment case. In a disparate treatment context, the plaintiff makes out a *prima facie* case merely by presenting evidence sufficient to give rise to an *inference* of discrimination.⁵⁷ Under a disparate impact standard, however, the plaintiff must actually prove the discriminatory impact at issue.⁵⁸

If the plaintiff makes out her *prima facie* case, the burden then shifts to the employer to prove that the employment practice in question is "job-related for the position in question and consistent with business necessity."⁵⁹ Even if the employer is able to establish a legitimate business necessity for his or her rule, the plaintiff may still prevail by demonstrating that a less discriminatory alternative employment practice would equally serve the employer's business necessity.⁶⁰ As we shall see, with regard to bilingual employees, the initial step of

49. David T. Wiley, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 GA. L. REV. 539, 549 (1995).

50. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

51. 401 U.S. 424 (1971)

52. *Id.* at 431.

53. 422 U.S. 405 (1975)

54. *Id.* at 425.

55. *Id.*

56. *Albemarle*, 422 U.S. at 425.

57. LINDEMANN & GROSSMAN, *supra* note 36, at 11.

58. *Id.* at 10.

59. *Albemarle*, 422 U.S. at 425. Unlike proof of discriminatory intent, both the burden of proof and the burden of persuasion are shifted to the employer in the second instance.

60. *Id.*

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proving a significant disparate impact as a result of an English-only rule is often fatal to any Title VII claim, and effectively moots the second and third step of the analysis.⁶¹

The Supreme Court subsequently applied a more stringent test for establishing adverse impact by relaxing the employer's required business necessity showing.⁶² However, Congress overturned that decision in the 1991 Civil Rights Act that amended Title VII, and the *Griggs-Albemarle* standard remains largely intact today.⁶³

C. The EEOC's National Origin Discrimination Guidelines and English-Only Rules

Acting under its authority to establish procedural guidelines necessary to carry out the provisions of Title VII,⁶⁴ the EEOC published the first Guidelines on Discrimination Because of National Origin in 1970.⁶⁵ The Guidelines define national origin broadly, as "including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or *because an individual has the physical, cultural or linguistic characteristics of a national origin group*."⁶⁶ In 1980, most likely in response to the first federal appellate court ruling on the subject,⁶⁷ the EEOC added a section specifically addressing English-only rules in the workplace as a form of national origin discrimination.⁶⁸ The newly amended section distinguishes between employer's "absolute" (applied at all times) and "limited" (applied only at certain times) English-only workplace rules and reads as follows:

§ 1606.7 Speak-English-only rules.

(a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic.

61. See *infra* Subsection II.D.1.

62. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

63. LINDEMANN & GROSSMAN, *supra* note 36, at 37.

64. 42 U.S.C. § 2000e-12(a). Congress created the EEOC specifically to administer Title VII. See 42 U.S.C. § 2000e-4. It is important to note that Congress specifically did not grant the EEOC the authority to promulgate regulations with the force of law. The EEOC was only given authority to issue "suitable procedural regulations." 42 U.S.C. § 2000e-12(a) (1994).

65. Guidelines on Discrimination Because of National Origin, 35 Fed. Reg. 421 (1970) (codified at 29 C.F.R. § 1606). This original version of the Guidelines made only passing reference to employment discrimination practices based upon language characteristics. See 35 Fed. Reg. 421 (1970) (codified at 29 C.F.R. § 1606.1(b)) (stating that "[the] Commission will examine with particular concern cases . . . grounded in national origin discrimination (such as) the use of tests in the English language where the individual tested came from circumstances where English . . . is not a requirement of the work to be performed").

66. 29 C.F.R. § 1606.1 (2001) (emphasis added).

67. See *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (finding that an employer's English-only rule did not deny a bilingual employee an equal condition of employment). See *infra* Subsection II.D.1 for a detailed discussion of the *Gloor* ruling.

68. 29 C.F.R. § 1606.7.

Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.⁶⁹

The amendment further includes a notice requirement that observes that "it is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore . . . the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule."⁷⁰

D. *Bilingual Employees and Burden Shifting: The Case Law on English-Only Workplace Rules*

1. *English-Only Jurisprudence Prior to the EEOC Guidelines: The Fifth Circuit's Disparate Analysis*

a. *Saucedo v. Brothers' Well Service*: "We don't tolerate no 'Mesican' talk"

Before 1980, only one federal court had addressed the issue of an English-only workplace rule.⁷¹ In *Saucedo v. Brothers Well Service, Inc.*,⁷² the district court for the Southern District of Texas held that an employer engaged in unlawful employment discrimination by discharging a Mexican-American employee for speaking two words of Spanish on the job while retaining another (Anglo) employee, even though he was guilty of the more serious misdeed of assaulting another employee during the same incident.⁷³ The facts of the case are as follows.

Brothers Well Service had hired John Saucedo as a "floor man" on a "workover rig" (a special rig placed over a normal oil rig to increase declining production). John Erdelt, Saucedo's immediate supervisor, had warned him on his first day on the job that the crew supervisor (or "tool pusher" in the parlance of the oil drilling business), Cleighton E. "Doc" Holliday, "didn't allow any

69. *Id.*

70. 29 C.F.R. § 1606.7(c) (2000).

71. Wiley, *supra* note 49, at 555. The EEOC had applied the Title VII disparate impact analysis to English-only cases in its own administrative hearings as early as 1970, ten years prior to the introduction of its Guidelines on English-only Rules. *Id.* at 554.

72. 464 F. Supp. 919 (S.D. Tex. 1979).

73. *Id.* at 922.

'Mesican' talk."⁷⁴ Erdelt told Saucedo that, as far as he was concerned, anyone could speak any language that he wanted on the job; however, Holliday "simply did not tolerate any 'Mesican' talk."⁷⁵ At the time of his discharge, Holliday overheard Saucedo speak two words of Spanish to Steve Perez, another bilingual Mexican-American employee, and fired him immediately.⁷⁶ When Perez sought to intervene by protesting the rule and its enforcement, Holliday beat him.⁷⁷

The Saucedo court emphasized three issues in reaching its conclusion that the company's actions were "clearly a breach of Brothers' (Title VII) obligation to avoid treating its employees discriminatorily."⁷⁸ First, the court noted that Brothers never gave Saucedo clear notice of the severe consequences of speaking Spanish on the job.⁷⁹ Next, the court reasoned that there might be circumstances where a rule absolutely prohibiting speaking a foreign language on the job, if properly noticed, would be justified. However, those circumstances are most likely to be dangerous work situations where "any failure of communication could lead to disastrous results."⁸⁰ The *Saucedo* court therefore determined that the crux of the court's inquiry must be "whether or not the employer can prove that his 'rule' requiring only English on the job is the result of business necessity."⁸¹

Finally, the *Saucedo* court found that "a rule that Spanish cannot be spoken on the job obviously has a disparate impact upon [bilingual and monolingual] Mexican-American employees [because] [m]ost Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job."⁸² The *Saucedo* opinion thus foreshadowed two of the key suppositions of the minority view regarding English-only workplace rules. First, it assumed that an English-only rule exerts a disproportionate burden on national origin language

74. *Id.* at 920.

75. *Id.*

76. *Id.* at 921. Saucedo had been ordered to bring a large metal part to Perez to be straightened. As Saucedo brought the heavy part to Perez, he asked Perez, in Spanish, where he wanted Saucedo to place the part ("donde lo quieres").

77. *Id.* at 922.

78. *Id.* Brothers' owner, Jarrel Nohavizta, retained Holliday (the "tool pusher") and did not reinstate Saucedo after Holliday fired him. Remarkably, the court felt compelled to note in dicta that it could "fully understand[]" the owner's actions "in permit[ting] and impliedly approv[ing] of" Holliday's "manifest racial discrimination" because "good tool pushers are undoubtedly hard to find." *Id.* at 920.

79. *Id.* at 921. "The only notice which Saucedo received . . . was his conversation with Erdelt" and he "did not tell Saucedo that the sanction for violation of the 'Holliday rule' was immediate discharge or dismissal." *Id.* This part of the *Saucedo* decision was later codified into the EEOC Guidelines at §1606.7(c).

80. *Id.* The court found that "Holliday's breach . . . was much more likely to cause safety and other problems than Saucedo's casual and harmless use of a Spanish phrase to another Mexican-American who fully understood the phrase." *Id.*

81. *Id.* at 922.

82. *Id.*

minorities, including bilinguals.⁸³ Finally, like the EEOC, it understood the most important issue to be whether the employer had a valid business justification for its workplace English-only rule.

b. *Garcia v. Gloor*: Immutable Characteristics, Title VII, and the Ability to Comply Rule

In 1980, immediately prior to the EEOC's amendment of its Guidelines to specifically address English-only workplace rules, the Fifth Circuit Court of Appeals became the first federal appellate court to uphold an employer's English-only workplace rule. In *Garcia v. Gloor*,⁸⁴ the court held that an English-only rule can *never* have a disparate impact, even upon members of protected national origin minority groups, if the employees impacted are "fully bilingual."⁸⁵

In *Gloor*, a bilingual Mexican-American employee (Hector Garcia) was fired for violating a company rule that employees speak only English, except when communicating with Spanish-speaking customers. Gloor Lumber and Supply Company was a family-owned business in Brownsville, Texas. It employed thirty-nine employees, including thirty-one Hispanics with varying degrees of English fluency, in both their lumberyard and as salespersons in their store.⁸⁶ Garcia was one of eight salesman employed by Gloor, seven of whom were Hispanic, "a matter perhaps of business necessity, because 75% of the population in [Gloor's] business area is of Hispanic background and . . . wish[es] to be waited on by a salesman who speaks Spanish."⁸⁷ While the company's rule allowed their employees to speak Spanish on the job only when conversing with a Spanish-speaking customer, it did not apply to conversations during work breaks nor to the monolingual Spanish-speaking yard workers.⁸⁸

Mr. Garcia was fired by a company official, who overheard him respond to a question in English from an Hispanic employee about an item that a customer had requested. Garcia replied in Spanish that the item was not available.⁸⁹

83. Although never explicitly stated in the court's opinion, Saucedo was undoubtedly bilingual. It is highly unlikely that Mr. Erdelt's initial explanation to Saucedo, that "Doc" Holliday didn't tolerate no "Mesican" talk, was told to Saucedo in Spanish. Also, Steve Perez replied in English when Saucedo asked him in Spanish where he wanted the part to be placed.

84. 618 F.2d 264 (5th Cir. 1980).

85. *Id.* at 268. On this point, without ever mentioning *Saucedo*, the *Gloor* court directly contradicted *Saucedo*, a case in its own circuit that had been decided less than eighteen months prior.

86. *Id.* at 267.

87. *Id.* The court ignored or overlooked the fact that a significant percentage of that majority population may have had limited language skills, even though it later made the distinction between limited proficiency English-speaking employees and fully fluent bilingual employees a significant element of its rationale.

88. *Id.* at 266.

89. *Id.* The phrase that likely got Mr. Garcia fired is "No hay mas." Each party disputed whether Mr. Garcia's work record also contributed to his termination. The Circuit Court, however, in order to reach the question of whether "an employer's rule forbidding a [fully] bilingual employee to speak anything but English in *public areas* while on the job is . . . discrimination based on national origin,"

The *Gloor* court held that an employer's limited English-only rule did not have a significant disparate impact based on national origin when enforced against an employee "who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule."⁹⁰ The court began its analysis by claiming that disparate impact inquiry under Title VII must be limited to immutable characteristics.⁹¹ The court reasoned that "the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice," or mutable, and therefore should not be protected.⁹²

The court also discounted the connection between language and national origin, warning that national origin should not be "confused with ethnic or socio-cultural traits."⁹³ However, the court reserved judgment as to how an English-only rule might be applied to employees with limited or no English language skills, noting that "[l]anguage may be used as a covert basis for national origin discrimination, if the person *only* speaks the forbidden language or has difficulty using another language than the one spoken in his home."⁹⁴

The *Gloor* court explicitly acknowledged that it was ruling in the absence of any guidance on English-only workplace rules from the EEOC.⁹⁵ The EEOC adopted its regulation on such rules later that same year, most likely in response to *Gloor*.⁹⁶

2. *English-Only Jurisprudence Subsequent to the EEOC Guidelines: The Ninth Circuit's Confused History*

The Court of Appeals for the Ninth Circuit is the only federal appellate court to hand down a published opinion on English-only workplace rules since the EEOC amended its Guidelines to address the subject in 1980.⁹⁷ *Garcia v. Spun Steak*⁹⁸ has become the leading case, somewhat by default.

Prior to its *Spun Steak* decision, a unanimous Ninth Circuit panel had concluded in *Gutierrez v. Municipal Court* that an English-only workplace rule at

assumed that Garcia's use of Spanish was "a significant factor" in his termination. Mr. Garcia's overall work record therefore became a moot point. *Id.* at 272 (emphasis added).

90. *Id.*

91. "Save for religion, the discriminations on which the Act focuses . . . are those that are either beyond the victim's power to alter . . . or that impose a burden on an employee on one of the prohibited bases or where a fundamental right was thought to be involved." *Id.* at 269 (emphasis added).

92. *Id.* at 270.

93. *Id.* at 269 (finding that "neither the statute nor common understanding equates national origin with the language that one chooses to speak").

94. *Id.* at 270.

95. *Id.* at 269.

96. See Wiley, *supra* note 49, at 566 n.171.

97. The Fourth and Eleventh Circuits have issued unpublished opinions. See *Long v. First Union Corp.*, 86 F.3d 1151 (4th Cir. 1996), *aff'g* 894 F. Supp. 933 (E.D. Va. 1995); *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir.), *cert. denied*, 508 U.S. 910 (1993).

98. *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir.), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994).

the Los Angeles Municipal Court had a significant disparate impact upon bilingual court interpreters and other court employees.⁹⁹ *Gutierrez* rejected the *Gloor* court's "ability-to-comply" rationale and instead relied on the EEOC Guidelines in deciding that English-only workplace rules "generally have an adverse impact on protected [language minority] groups [including bilinguals]" and presuming that such rules would therefore "ordinarily constitute discriminatory conditions of employment."¹⁰⁰ Consequently, the *Gutierrez* court ruled that an employer must first demonstrate a legitimate business necessity in order to withstand a challenge to a limited workplace English-only rule. However, *Gutierrez* was subsequently vacated as moot when the lead plaintiff quit her job while the case was on appeal for certiorari to the Supreme Court.¹⁰¹

The Ninth Circuit's ruling in *Garcia v. Spun Steak* was based on facts similar to those in *Gutierrez*. A divided panel in *Spun Steak* directly contradicted the *Gutierrez* holding. The court reasoned that English-only rules have no impact on bilingual national-origin minorities, and specifically rejected the EEOC Guidelines on which the *Gutierrez* court had relied.¹⁰²

Spun Steak Company was a San Francisco wholesale meat and poultry distributor that employed thirty-three workers, twenty-four of whom spoke Spanish.¹⁰³ Two of the Spanish-speakers spoke no English, while the other employees had "varying degrees of proficiency in English."¹⁰⁴ Unlike the employees in *Gloor* and *Gutierrez*, Spun Steak's employees were not required to speak or understand English as a condition of employment.¹⁰⁵

In 1990, Spun Steak imposed an English-only rule in response to complaints from two non-Spanish speaking employees that some of the Hispanic workers were "using their bilingual capabilities to harass and to insult other workers in a language they could not understand."¹⁰⁶ Hispanic employees were exempted from the rule during their lunch and break times. A rule forbidding "offensive racial, sexual, or personal remarks of any kind" was also adopted.¹⁰⁷

Priscilla Garcia and Maricela Buitrago, two of Spun Steak's Hispanic employees, received warning letters for speaking Spanish during working hours

99. *Gutierrez v. Mun. Court*, 838 F.2d 1031 (9th Cir.), *reh'g denied*, 861 F.2d 1187 (9th Cir. 1988), *cert. granted and judgment vacated*, 490 U.S. 1016 (1989). The judges of the Southeast Judicial District of the Los Angeles Municipal Court initially imposed an absolute prohibition on languages other than English (notwithstanding the necessary exception for the court interpreters' translation duties). They later amended the rule to except lunch-time and employee breaks. The plaintiffs brought their claim against this limited ban. 838 F.2d at 1041, n.10.

100. *Gutierrez*, 838 F.2d at 1044.

101. *Gutierrez*, 490 U.S. at 1016.

102. In a brief footnote, Judge O'Scannlain noted that because *Gutierrez* had been vacated as moot, the panel was not bound by its reasoning. *Spun Steak*, 998 F.2d at 1482.

103. *Id.* at 1483.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

and were prohibited from working together for two months because of their violation. When the employees' union could not get the company to reconsider its rule, Garcia and Buitrago filed suit. They charged that the rule had a discriminatory impact on the company's Hispanic employees in three ways: (1) it denied them their right to express their cultural heritage in the workplace; (2) it denied them a privilege enjoyed by monolingual English-speaking employees, namely the privilege to speak their primary language; and (3) the rule created an "atmosphere of inferiority, isolation, and intimidation."¹⁰⁸

The *Spun Steak* court found that the plaintiffs had not made out a prima facie case of disparate impact.¹⁰⁹ The court disposed of the plaintiffs' first charge by reasoning that although "an individual's primary language can be an important link to his ethnic culture and identity . . . [Title VII] does not confer substantive privileges" such as "the ability of workers to express their cultural heritage at the workplace."¹¹⁰

Next, the court addressed the plaintiffs' claim that the company's English-only rule denied national origin minorities a privilege routinely enjoyed by the company's native English speakers: the privilege to speak the language in which they were most comfortable while on the job. The court began by resolving that "a privilege . . . is by definition, given at the employer's discretion" and therefore "an employer has the right to define its contours."¹¹¹ Consequently, the court adopted the employer's own narrow definition of the privilege as the freedom to converse *in English* on the job.¹¹² The majority believed that the privilege had no discriminatory impact on those plaintiffs who were bilingual because they could freely engage in work-time conversation in English.¹¹³ The *Spun Steak* majority therefore embraced the pre-Guidelines rationale of *Gloor* by reasoning that "it is axiomatic that 'the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice.'"¹¹⁴ Because of this, the court held that there is no disparate impact "if the rule is one that the affected employee can readily observe."¹¹⁵

Regarding the employees' final claim, the *Spun Steak* majority found that the plaintiffs had "presented no evidence other than conclusory statements" that the English-only policy "contributed to an atmosphere of isolation, inferiority or intimidation."¹¹⁶ The court conceded that determining whether a protected group was adversely affected with regard to their "conditions, terms or privi-

108. *Id.* at 1486-87.

109. *Id.* at 1486.

110. *Id.* at 1487.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)).

115. *Id.*

116. *Id.* at 1489.

leges of employment” may depend on “subjective factors, not easily quantified.”¹¹⁷ Nevertheless, the majority decided that the fact that “the alleged facts are subjective” does not allow the plaintiffs to satisfy their initial burden “merely [by] assert[ing] that the policy has harmed members of the group to which he or she belongs.”¹¹⁸

Finally, the *Spun Steak* majority explicitly rejected the EEOC Guidelines on English-only rules in the workplace, finding that it is clear that “Congress intended a balance be struck in preventing discrimination and preserving the independence of the employer,” which, they reasoned, the Guidelines did not do.¹¹⁹ The court held that the EEOC’s Guidelines¹²⁰ contravened Congressional intent in presuming that the mere existence of an English-only workplace rule was enough to satisfy the plaintiff’s burden to “demonstrate” disparate impact.¹²¹ As a result, the court found “compelling indications that (the Guidelines are) wrong.”¹²²

On this last point, there was a strong dissent by Judge Boochever, who argued that the panel should “defer to the [Equal Employment Opportunity] Commission’s expertise in construing the [Civil Rights] Act.”¹²³ Judge Boochever contended that it would be difficult to imagine how a plaintiff might satisfy her burden of proving discriminatory impact on her terms, conditions, and privileges of work without referencing “conclusory self-serving statements . . . or possibly by expert testimony of psychologists.”¹²⁴ Accordingly, he believed that “while one may reasonably differ with the EEOC’s position as a matter of policy,” he could find no compelling indication that the policy was wrong.¹²⁵

117. *Id.* at 1486. The *Spun Steak* majority noted that because the claim did not concern barriers to hiring or promotion it was “outside the mainstream of disparate impact cases [we have] decided thus far” and consequently a case of first impression. The court pointed out the difficulty of providing the statistical evidence typically required to make out a *prima facie* case under disparate impact analysis in a case concerning conditions of employment. *Id.* at 1485.

118. *Id.*

119. *Id.* 1490.

120. And, by inference, their own previous ruling in *Gutierrez*.

121. 998 F.2d at 1490. The *Spun Steak* majority required that in order to make a *prima facie* demonstration of discriminatory impact, a plaintiff “must prove the existence of adverse effects of the policy, must prove that the impact of the policy is on terms, conditions, or privileges of employment of the protected class, must prove that the adverse effects are significant, and must prove that the employee population in general is not affected by the policy to the same degree.” *Id.* at 1486.

122. *Id.* at 1490 (quoting *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973), the case that introduced the Supreme Court’s standard for rejecting an administrative agency’s procedural guidelines).

123. *Id.* at 1490 (Boochever, J., dissenting). Judge Boochever specifically pointed to the EEOC’s conclusion that English-only rules may “create an atmosphere of inferiority, isolation and intimidation based on national origin, which could result in a discriminatory working environment.” *Id.* (quoting 29 C.F.R. § 1606.7(a) (1991)).

124. *Id.*

125. *Id.* at 1491.

3. *The Minority Position: Recent Developments*

Two recent district court cases have considered new evidence and challenged the rationale of the *Gloor-Spun Steak* line of opinions with respect to bilingual employees and workplace English-only rules. Together, they represent a developing minority position in support of the analysis of the EEOC Guidelines.

a. Writing on a Clean Slate: *EEOC v. Synchro-Start Products, Inc.*

The court in *EEOC v. Synchro-Start Products, Inc.*,¹²⁶ “writing on a clean slate in this Circuit,”¹²⁷ disagreed with the *Gloor-Spun Steak* majority rule and held that the procedural method of the EEOC Guidelines (providing that an employer’s English-only rule presumptively violates Title VII with regard to national origin minorities, unless the employer can establish a business necessity for the rule) comports with the statutory requirements for a valid Title VII claim.

Synchro-Start Products employed 200 employees, many of whom were of Polish or Hispanic national origin and who spoke English with varying degrees of proficiency.¹²⁸ Beginning in September of 1997, Synchro-Start “required [all] its employees to speak only English during working hours.”¹²⁹ Additionally, management “did not explain the consequences of violating the English-only rule to its employees.”¹³⁰ The EEOC brought suit claiming that the rule had a disparate impact on the company’s national origin minorities.

The *Synchro-Start* court held that, with respect to the subset of employees who spoke little or no English, even under a *Spun Steak* analysis the EEOC had plainly stated a viable claim.¹³¹ However, the *Synchro-Start* court found that it could go “beyond that easy case . . . to impose liability across a broader spectrum,” specifically identifying those bilingual employees who can “readily comply” with such a rule and “still enjoy the privilege of [conversation] on the job.”¹³² The court reasoned that the EEOC’s presumption of discriminatory impact in the case of an English-only rule merely creates “an *inference*” that a plaintiff is disadvantaged by an English-only rule (what the court calls an evi-

126. 29 F. Supp. 2d 911 (N.D. Ill. 1999).

127. *Id.* at 913. *Synchro-Start* was decided in the Seventh Circuit, which had no previous precedent with regard to English-only workplace rules.

128. *Id.* at 912.

129. *Id.* The company’s English-only rule made no accommodation for those employees with little or no English language skills.

130. *Id.*

131. *Id.* at 913 (finding that even *Spun Steak* found that “as applied ‘to a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home’ an English-only rule might well have an adverse impact”) (quoting *Garcia v. Spun Steak*, 998 F.2d 1480, 1486 (9th Cir. 1993)).

132. *Id.* (quoting *Spun Steak*, 998 F.2d at 1487).

dentiary tie-breaker) because of his or her national origin.¹³³ The EEOC's inference is justified because an English-only rule may create "an atmosphere of inferiority, isolation and intimidation based on national origin."¹³⁴ Agreeing with the dissent in *Spun Steak*, the court found that the only way to prove that such an atmosphere caused a "significant disparate impact" is through the use of subjective evidence, and not the traditional statistical evidence of a disparate impact claim.¹³⁵

b. To Choose or Not to Choose: *EEOC v. Premier Operator Services*

A recent ruling by a magistrate judge in the Fifth Circuit contradicts the rationale of its own Court of Appeals in *Gloor*. The district court in *EEOC v. Premier Operator Services*¹³⁶ called into doubt *Gloor's* "ability to comply" rationale by noting that extensive social science research contradicting many of *Gloor's* assumptions had become available since *Gloor* was decided. The court also determined that it was obligated to consider any relevant administrative agency guidelines, promulgated subsequent to the *Gloor* decision.¹³⁷

Premier Operator Services was a class action suit, in which the plaintiffs, thirteen bilingual Mexican and Mexican American telephone operators, had been recruited and hired specifically for their bilingual abilities by the defendant, Premier Operator Services ("Premier").¹³⁸ Premier later enacted an English-only policy, prohibiting any employee conversations on the company premises, except those conducted in English. The rule allowed conversation in other languages only when speaking with non-English speaking customers.¹³⁹ The policy was posted at the entrance to the building where Premier was located, along with a notice that "conspicuously couple[d] the policy with a warning about weapons, implying a combined concern about the conduct of

133. *Id.* at 914. The court explained:

If the only evidence placed before the fact finder were the existence of such a rule, with no explanation being proffered either way as to the reason for the rule or as to the manner in which it actually impacts, that level of evidentiary silence would call for a verdict in the employee's favor rather than the employer's on the element of disparate impact. And in those terms the question really becomes one of interpretation rather than of any effort to override legislative intent—a proper sphere for extending deference to the agency's knowledge and experience.

Id.

134. *Id.* (quoting 29 C.F.R. § 1606.7).

135. *Id.* at 914-15. Judge Boochever, in dissent in *Spun Steak*, had agreed with most of the majority's decision, but had disagreed strongly with the majority's refusal to defer to the EEOC Guidelines. *Spun Steak*, 998 F.2d at 1490-91.

136. 113 F. Supp. 2d 1066 (N.D. Tex. 2000).

137. *Id.* at 1074.

138. *Id.* at 1068. Collect phone calls from Mexico comprised a significant portion of Premier's business. The company needed Spanish-speaking operators to understand any requests from the collect caller. See *EEOC Wins English-only Lawsuit, Record-Breaking Award*, 77 INTERPRETER RELEASES 1551 (Oct. 30, 2000).

139. *Premier Operator Servs.*, 113 F. Supp. 2d at 1069.

Spanish as Second-Hand Smoke

those persons who speak a language other than English.”¹⁴⁰ The company further stipulated that it planned to install a public telephone outside of the building, so that in order to make any personal phone calls during which they might need to speak Spanish (to monolingual Spanish-speaking family members, for instance), Hispanic employees would have to exit the building.¹⁴¹ Premier subsequently required all the bilingual, Hispanic employees to sign a memo agreeing that they knew of the policy and knew that violation of the policy would result in their dismissal.¹⁴² Six employees who refused to sign the memo were immediately terminated, while another two who signed under protest and then filed EEOC charges were terminated within 24 hours of Premier’s receipt of the charges.¹⁴³ The court also found that while all 13 of the employees who had been terminated were Hispanic, all 14 employees who replaced them were non-Hispanic.¹⁴⁴

In a preliminary ruling rejecting the defendant’s pre-trial motion to dismiss the *Premier Operator Services* court noted that its own Court of Appeals had instructed the circuit’s lower courts to consider changes in subsequent administrative regulations that might bear upon existing precedent in that Circuit.¹⁴⁵ The court recognized that *Gloor* had itself acknowledged that it was ruling in the absence of any guidance from EEOC regulations.¹⁴⁶ Additionally, the court relied on deliberations during passage of the 1991 Amendment to Title VII, in the course of which there was agreement by some members of the Senate that the EEOC’s Guidelines represent a valid interpretation of Title VII.¹⁴⁷

140. *Id.* at 1069-70. The sign stated: “Absolutely No Guns, Knives or Weapons of any kind are allowed on these Premises at any time! *English* is the official language of Premier Operator Services, Inc. All conversations on these premises are to be in English. Other languages may be spoken to customers who cannot speak English.” *Id.*

141. *Id.* at 1069. It is difficult not to notice the similarity between the treatment of spoken Spanish and the prohibition of cigarette-smoking in workplaces because of the deleterious health effects of second-hand smoke (or “ETS” for environmental tobacco smoke). While the Environmental Protection Agency has classified ETS as a Group A carcinogen (known to cause cancer in humans), *see* Press Release, Centers for Disease Control and Prevention, Exposure to Second-Hand Smoke Widespread (Apr. 1996), available at <http://www.cdc.gov/od/oc/media/pressrel/second1.htm>, along with other highly toxic substances like asbestos, radon, and benzene, exposure to Spanish of course has not been identified as the cause of any ill health effects.

142. *Premier Operator Servs.*, 113 F. Supp. 2d at 1069.

143. *Id.*

144. *Id.*

145. 75 F. Supp. 2d 550, 556 (N.D. Tex. 1999) (following *Kapche v. City of San Antonio*, 176 F.3d 840 (5th Cir. 1999), which vacated a district court’s grant of summary judgment based upon prior case law, because the district court failed to consider changes in administrative regulations).

146. *Premier Operator Servs.*, 113 F. Supp. 2d at 1074. Even commentators who have rejected the EEOC Guidelines have recognized that the *Gloor* court qualified its ruling when it noted the lack of EEOC guidance available and also noted that the ruling has been “criticized as obsolete in light of post-*Gloor* policy.” Wiley, *supra* note 49, at 556-57.

147. 113 F. Supp. at 1074 (citing *United States v. Rutherford*, 442 U.S. 544, 554 (1979) (“An agency interpretation is entitled to greater deference when Congress is aware of the interpretation and chooses not to change it when amending the statute in other respects”)). The *Premier Operator* court found that Congress specifically discussed the EEOC Guidelines regarding English-only rules during the hearings and chose not to alter them. *See infra* Section III.F (discussing Congressional intent and

The court also found that the psycho-linguistic research done since *Gloor* demonstrated that speaking only English is not simply a matter of preference for many bilingual national origin minorities.¹⁴⁸ Because of this information, the court concluded, "Speak-only-English rules tend to impact people whose national origin is from non-English speaking countries more heavily than it affects others."¹⁴⁹ Following the reasoning of the dissent in *Spun Steak*,¹⁵⁰ it held that the ability to comply should not be the measure of a rule's discriminatory impact.¹⁵¹

III. THE ANALYSIS

In addressing English-only workplace rules, the leading appellate court cases have distinguished between "fully bilingual" employees and those language minorities with limited or no English language skills. However, this attempt at line drawing fundamentally misunderstands the relationship between national origin and language, as well as the most recent research regarding bilinguals. While giving lip service to the importance of language for national origin minorities, those cases have misunderstood the close connection between one's primary language and how a workplace English-only rule exposes bilingual national origin minorities to severe consequences.

A. *Title VII and the Nexus between Language and National Origin*

One of the key distinctions between the leading cases' view on English-only workplace rules and the EEOC/minority view is their understanding of the relationship between language and national origin for Title VII purposes. Since restrictions on language use are never specifically mentioned in Title VII,¹⁵² an important initial question is how broad an interpretation Congress intended when it prohibited employment discrimination based upon national origin in

deference to the EEOC Guidelines in addition to relevant text of the Senate hearing). This highly relevant indication of Congressional intent in passing Title VII was ignored by the *Spun Steak* majority, even though *Spun Steak* was decided nearly two years after these hearings took place.

148. 113 F. Supp. 2d at 1074. (finding that "the most recent and directly relevant . . . research [shows that] switching between English to Spanish is often inadvertent and unconscious" for someone whose primary language is not English, but is still fully bilingual). "This 'code-switching' cannot be turned off" and that person "cannot be forced to refrain from uttering a word of the primary language simply upon direction . . . because this switching is or can be an unconscious act." *Id.*

149. *Id.* at 1073 (citing EEOC v. Sychro-Start, Inc., 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999)).

150. 13 F.3d 296, 298 (1993) (Reinhardt, J., dissenting).

151. *Premier Operator Servs.*, 113 F. Supp. 2d at 1075 (quoting *Spun Steak*, 13 F.3d at 298 (Reinhardt, J., dissenting)) (noting that "[S]ome of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: [African-Americans] being required to sit in the back of the bus for example"). The magistrate judge in *Premier Operator Services* pointed out that, under an ability-to-comply standard, "[A] black employee could not challenge a rule requiring the use of separate bathrooms and drinking [fountains]; [and] an Orthodox Jew could not challenge a rule forbidding the wearing of head coverings." *Id.*

152. See *supra* notes 22-23 and accompanying text.

Title VII.¹⁵³

The leading appellate court cases on English-only rules have interpreted Title VII narrowly with regard to language discrimination. In distinguishing national origin from the ability to speak a foreign language, the *Gloor* court specifically warned that “national origin must not be confused with ethnic or socio-cultural traits or an unrelated status.”¹⁵⁴ The *Spun Steak* majority conceded that, “even in the case of bilinguals, language provides an important link to an individual’s ethnic culture and identity.”¹⁵⁵ Nonetheless, it chose to read the statute narrowly when it indicated that it was strongly influenced by the fact that neither the statute nor the legislative history specifically mentioned English-only rules.¹⁵⁶

However, such a narrow interpretation is not consonant with either scientific or common understanding. Since the rise of the modern nation-state, language has been intimately associated with nationality.¹⁵⁷ While most linguistic scholars agree that language is one of the fundamental components of nationality,¹⁵⁸ at least some consider language to be the most significant factor in determining national or ethnic identity.¹⁵⁹ Numerous legal commentators examining the scientific literature have found an “inextricable link between language and national origin.”¹⁶⁰

In addition, for some minorities, including Hispanics, language may be an even stronger indicator of ethnic or national identification than is usual.¹⁶¹

153. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Marshall, J., dissenting) (“Like any issue of statutory construction, the question of [the scope of Title VII coverage] turns solely on congressional intent.”).

154. *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980).

155. *Spun Steak*, 998 F.2d at 1486.

156. *Id.* at 1489. *But see id.* at 1490 (Boochever, J., dissenting) (pointing out that “[t]he lack of directly supporting language in [the Act] or in the legislative history of Title VII, relied upon by the majority, does not . . . make the Guideline inconsistent with an obvious congressional intent not to reach the employment practice in question” (quoting *Espinoza v. Farrah Mfg. Co.*, 414 U.S. 86, 94-95 (1973), for standard of deference to EEOC Guidelines in the absence of “compelling indications that it is wrong.”)); Perea, *supra* note 28 (reviewing Title VII’s legislative history and finding that Congress spent very little time discussing national origin at all).

157. Robert D. King, *Should English Be the Law?*, ATLANTIC MONTHLY, Apr. 1997, available at <http://www.theatlantic.com/issues/97apr/english.htm> (analyzing the historical link between language and nationalism and determining that “the marriage of language and nationalism goes back at least to Romanticism”).

158. See, e.g., RALPH FASOLD, 1 INTRODUCTION TO SOCIOLINGUISTICS: LANGUAGE IN SOCIETY 5 (1984) (finding that language, culture, religion and history are the principal components of nationality).

159. See, e.g., JOSHUA FISHMAN, LANGUAGE AND NATIONALISM 46 (1972) (finding that “no factor is more intimately tied to ethnic or national identity than is language”); King, *supra* note 157 (noting that after the French Revolution “nationhood itself became aligned with language”). In his article, King notes the lament of historian/economist Arnold Toynbee that, post-World War I, “the growing consciousness of Nationality has attached itself neither to traditional frontiers nor to new geographical associations but almost exclusively to mother tongues.” *Id.*

160. Adams, *supra* note 47, at 1329-30; see, e.g., Behm, *supra* note 12, at 593; Juan F. Perea, *English-Only Rules and the Right to Speak One’s Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 276-77 (1990).

161. See *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (reviewing expert witness testimony

Historically, the language characteristic has been a key identifier of outsider status and a source of severe prejudice in nations around the world,¹⁶² as well as here in the United States.¹⁶³

Furthermore, many legal commentators, have pointed out that prejudiced behavior is more often the result of animosity towards the underlying characteristics that an ethnic minority exhibits, than of the literal fact of country of national origin.¹⁶⁴ It is, for instance, difficult to imagine that a tall, blond-haired, blue-eyed, American of Mexican heritage who spoke English without an accent, would experience the same level of discrimination in the United States as would a shorter, dark-skinned, brown-eyed American of Mexican heritage who spoke English with a heavy accent. One commentator has gone so far as to state that, for the purposes of fulfilling Title VII's objectives, "what is usually labeled national origin discrimination, is actually discrimination because of a person's ethnic traits."¹⁶⁵

Additionally, a recent ruling in the Eleventh Circuit gives some guidance regarding the scope of Congressional intent in including the national origin term in Title VII. The court in *Sandoval v. Hagan* documented the numerous instances, in both case law and federal policy, in which language and national origin are recognized as having a nexus, particularly for the purposes of disparate impact analysis.¹⁶⁶

In *Sandoval*, the plaintiffs in a class action suit challenged Alabama's Department of Motor Vehicles official policy requiring all portions of the state's driver's license examination, including the written exam, to be administered in English only.¹⁶⁷ Under the rule, interpreters, translation dictionaries, and other

that "for Mexican-Americans . . . the Spanish language is the most important aspect of ethnic identification and it is to them what skin color is to others").

162. See *Garcia v. Spun Steak*, 13 F.3d 296, 298 (1993) (Reinhardt, J., dissenting) (noting that language has historically been "a potent source of . . . discrimination" and citing ethnic conflicts over language that have been waged over decades, including Basque and Catalan in Spain, as well as Ukrainian in the Soviet Union).

163. See *Mirandé*, *supra* note 19 (noting that Spanish-speaking ability has been historically devalued in the United States, e.g., "No Spanish" rules were the norm in schools throughout the Southwest until the 1960s).

164. E.g., Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1165 (1985) ("Differences in dress, language, accent and custom [individual characteristics] . . . are more likely to elicit prejudicial attitudes than the fact of the [national] origin itself."); Perea, *supra* note 28, at 833-34 (explaining that "[e]thnicity consists of . . . shared traditions [and] values . . . which contribute to sense of distinctiveness among members of a group. These traits . . . engender a perception of group distinctiveness in persons who are not members of that group. It is the perception of difference, often based on ethnic traits, that results in discrimination.").

165. Perea, *supra* note 28, at 809.

166. *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds sub nom.* *Alexander v. Sandoval*, 531 U.S. 1049 (2001). The plaintiffs in *Sandoval* brought the claim on the basis of Title VI's prohibition against discrimination in any program that receives federal funding. However, the Eleventh Circuit has adopted Title VII's proof analysis for purposes of proving Title VI discrimination. Therefore, their ruling has the same impact on Title VII analysis within the circuit as it does on Title VI.

167. *Id.* at 487. In 1990, the Alabama legislature ratified an amendment to the state constitution that designated English as the official language of the state, and directed "officials of the state [to] take

interpretive aids were officially forbidden.¹⁶⁸

On appeal, the Department's only defense on the merits was that language discrimination could never have a legally significant disparate impact on the basis of national origin because it has never been found to serve as a proxy for national origin.¹⁶⁹ The defense relied on *Gloor* and *Spun Steak* to support its claim.¹⁷⁰

The *Sandoval* court first found that the defendants had conflated intentional discrimination and disparate impact analysis.¹⁷¹ The appellate panel clarified that "the correct analysis is not whether language equals national origin, but whether the policy . . . has an unjustified disparate impact on the basis of national origin."¹⁷² Next, the *Sandoval* court held that, as a matter of law, language restrictions in general and the Department's English-only policies in particular can have a significant disparate impact on national origin minorities.¹⁷³ For support for this proposition, the appellate court analyzed "Supreme Court precedent and longstanding congressional provisions and federal agency regulations [that] have repeatedly instructed . . . that a nexus exists between language and national origin" and consequently determined that language restrictions can have a disparate impact on national origin minorities.¹⁷⁴ Therefore, *Sandoval* seems to discredit the narrower readings of national origin discrimination originating in the *Gloor-Spun Steak* line of rulings.

However, *Sandoval* distinguished both *Gloor* and *Spun Steak* by pointing out that the plaintiffs in those cases were "fully bilingual."¹⁷⁵ The *Sandoval* court limited its holding to those minorities with limited or no English language skills, following the *Gloor* court's ability-to-comply rationale.¹⁷⁶

So, if the effect on a bilingual national origin minority of an English-only rule on a driver's test does not rise to the level of a legally cognizable disparate

all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." In response, the Department adopted a policy that required all portions of its driver's license examination process to be administered in English only. *Id.* at 487-88.

168. *Id.* at 488. The court noted the Department still permitted non-English-speaking drivers from other states and foreign countries to exchange a valid out-of-state license for an Alabama license without taking the written exam. Furthermore, the Department's official policy continued to provide special accommodations for illiterate, hearing-impaired, deaf, and disabled applicants. *Id.*

169. *Id.* at 508.

170. *Id.*

171. *Id.* at 509 ("While existing law is unclear as to whether language may serve as a proxy for intentional national origin discrimination . . . this question is tangential to disparate impact analysis.").

172. *Id.*

173. *Id.* at 510 (determining that "it is not the nature of the policy that is examined (by the court, for disparate impact) but its effect . . . [I]f its effect is an unjustified disparate impact on the basis of race, color, or national origin, the policy violates Title VII.").

174. *Id.*

175. *Id.*

176. *Id.* The members of the class in *Sandoval* were defined as "all legal residents of the State of Alabama who are otherwise qualified . . . but cannot [obtain a driver's license] because they are not sufficiently fluent in English." *Id.* at 488.

impact, why should the same rule, affecting the same population, be recognized as having an impact in an employment context? The answer lies in the likelihood that bilinguals will violate the rule and in the consequences likely to befall them if they do.

B. *Distinguishing Sandoval from the Workplace English-Only Cases*

Socio-linguists find that multilingual persons who have learned two or more languages while still young often unconsciously switch between the two "when speaking informally with fellow members of their [own] cultural group."¹⁷⁷ This "code switching," as it is called in the literature, involves the alternation of two languages within a single conversation, sentence, or even within constituent parts of a sentence.¹⁷⁸ An early study of bilingual Norwegians in the United States found that "[s]peakers will often be quite unaware that they are switching back and forth between two languages; they are accustomed to having bilingual speakers before them, and know that whichever language they use, they will be understood."¹⁷⁹ Additionally, code switching has utility for bilinguals; recent studies have confirmed bilinguals' tendency to engage in code switching unconsciously as well as consciously "in order to achieve certain communicative goals and convey socio-semantic connotations."¹⁸⁰

Code switching would be largely irrelevant in the context of the *Sandoval* case. The *Sandoval* court was chiefly concerned with any disparate impact on a language minority's ability to comprehend English on a written driver's test.¹⁸¹ There was little concern that a bilingual language minority might "slip" into their primary language during their driver's test. This would not endanger their ability to understand and pass the (written) test. The rule created no penalty for the language minority who may inadvertently speak a foreign language during the test; it only required that the test be given in English.

C. *Code Switching: Bilinguals' Propensity to (Inadvertently) Violate a Workplace English-Only Rule*

Conversely, code switching in workplace English-only cases is highly relevant. Under such rules, bilingual employees are prohibited from speaking their primary language for long periods every day, and code switching means that

177. EEOC v. Premier Operator Servs., 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (expert testimony of Dr. Susan Berk-Seligson).

178. Shana Poplack, *Sometimes I'll Start a Sentence in Spanish Y Termino in Español: Toward a Topology of Code-Switching*, 18 LINGUISTICS 581, 583 (1980).

179. Alfredo Mirandé, *Now that I Speak English, no me Dejan Hablar ("I'm Not Allowed to Speak")*: The Implications of *Hernandez v. New York*, 18 CHICANO-LATINO L. REV. 115, 146 (1996) (quoting EINAR HAUGEN, THE NORWEGIAN LANGUAGE IN AMERICA 65 (1969)).

180. Hans Dua, *Perspectives on Code-Switching Research*, 12 INT'L J. DRUIDIAN LINGUISTICS 136, 136-37 (1984).

181. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1282 (1998).

Spanish as Second-Hand Smoke

bilingual employees are more likely to violate an English-only rule (and suffer whatever consequences the employer has instituted).¹⁸²

Contrary to the majority rule, the research into code switching indicates that adhering to an English-only requirement is not simply a matter of preference for many “fully” bilingual speakers,¹⁸³ and that code switching cannot typically be turned off and on in response to a rule.¹⁸⁴ This is particularly true for bilingual speakers who grew up in communities where code switching is an accepted and common form of communication.¹⁸⁵

Additionally, socio-linguists find that, for bilinguals, conversation in a particular language often acts as an unconscious stimulus to continue using that language in their subsequent conversation.¹⁸⁶ This means that code switching is especially relevant in service occupations, as in *Gloor* or *Premier Operator Services*, where bilinguals are required to speak with, for instance, Hispanic customers in Spanish, but are then prohibited from speaking anything but English to other Hispanic employees. Requiring this type of rigorous control over language choice is particularly difficult for bilinguals who grew up, for example, in Spanish-speaking households and in majority Hispanic communities, where they “automatically” spoke Spanish, or “switched” between Spanish and English, with anyone whom they assumed to be Hispanic and bilingual. This would also explain how an English-only rule affects bilinguals in other types of occupations, such as in *Spun Steak* and *Synchro-Start*, where the ethnic composition of the workplace mirrored the surrounding community, with significant language-minority populations.¹⁸⁷

The *Gloor* court seems not to have been aware of the code switching phenomena¹⁸⁸ or not to have been persuaded by it.¹⁸⁹ This is not unlikely, consid-

182. If, in fact, the courts provide protection for monolingual foreign language speakers from an English-only workplace rule, as even the *Gloor* and *Spun Steak* majority have indicated they should, bilinguals are the only ones likely to violate the rule and suffer the consequences.

183. NANCY FAIRES CONKLIN & MARGARET A. LOURIE, *A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES* 6 (1983).

184. *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (testimony of expert witness Dr. Susan Berk-Seligson).

185. *Id.*

186. Telephone interview with Keith Walters, Associate Professor of Linguistics, University of Texas at Austin (Sept. 18, 2001); *Premier Operator Servs.*, 13 F.3d at 1070 (citing expert testimony of Dr. Susan Berk-Seligson that “bilingual speakers will [often] . . . continue to speak in the language in which they most recently spoke, as in a case where an Operator turns to speak to a fellow worker immediately following a conversation with a Spanish speaking customer”).

187. The *Spun Steak* Company was an assembly line operation in San Francisco with a significant majority of Spanish language speakers, all with varied proficiencies in English. *Garcia v. Spun Steak*, 13 F.3d 296, 297 (9th Cir. 1993). *Synchro-Start Products, Inc.* of Chicago employed significant populations of Polish- and Spanish-speaking employees, also with varied proficiencies in English. *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999).

188. *Premier Operator Servs.*, 113 F. Supp. 2d at 1074 (finding that “*Gloor* was . . . decided prior to the [most recent] extensive research, studies and scientific findings” on code switching).

189. *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). Although Mr. Garcia testified that “he found the English-only rule difficult to follow,” the court accepted without comment the trial court’s

ering that the court specifically acknowledged that it was ruling in the absence of an agency or statutory standard for testing English-only language rules or any general policy to act as guidance.¹⁹⁰ Thirteen years later, however, the *Spun Steak* court used the same rationale, following *Gloor* in finding that "it is axiomatic that 'the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice.'"¹⁹¹ In relying on such conclusive statements about the nature of bilingualism, neither court cited any of the scientific literature.

The code switching evidence directly contradicts these assumptions of rigorous control over language choice in all environments and instances. The EEOC recognized this, post-*Gloor*, when it acknowledged in the 1987 Amendment to the Guidelines on Discrimination Because of National Origin that "it is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language."¹⁹²

Conversely, there is not a comparable risk of violating such a rule for monolingual native English speakers; in fact, there is no risk at all.¹⁹³ Unlike other facially neutral rules, English-only rules have an "exclusive adverse impact" on language minorities.¹⁹⁴ Given the reasoning of the majority rule,¹⁹⁵ the effects of English-only workplace rules are borne exclusively by bilingual employees. Unlike the driver's test restrictions in *Sandoval*, workplace English-only rules specifically impact bilingual language minorities. Because of their inadvertent propensity to violate workplace English-only rules, bilinguals are disproportionately likely to suffer any consequences. Consideration of the code switching evidence should have an enormous influence on a court's decision,

findings that "Mr. Garcia was fired [primarily] for . . . *deliberately* speaking Spanish on the job *in purposeful violation* of the [English-only] . . . rule." *Id.* at 266-68 (emphasis added).

190. *Id.* at 268 n.1. The court's holding that "there is no disparate impact if the rule is one that an affected employee can readily observe and nonobservance is a matter of individual preference" indicates no apparent awareness of the tendency of bilingual minorities to code switch. *Id.* at 270.

191. *Spun Steak*, 998 F.2d at 1487 (quoting *Gloor*, 618 F.2d at 270).

192. Guidelines at § 1606.7(c).

193. Perea, *supra* note 20, at 289, points out that normally, "facially neutral rules are facially neutral because they operate to disqualify members of both the majority class and the protected minority class." Thus, facially neutral height and weight requirements, that are often found illegal because they unfairly disadvantage women, would also disqualify at least some men. On the other hand, an "English-only rule, will never have any adverse impact on persons whose primary language is English. No member of the majority . . . will ever be disqualified because of the operation of the rule." *Id.* at 290.

194. *Premier Operator Servs.*, 113 F. Supp. 2d at 1070 (pointing out that while Hispanic employees faced "the very real risk of being reprimanded or . . . losing their jobs if they [even inadvertently] violated the English-only rule . . . there was no comparable risk . . . [for] non-Hispanic employees, particularly since they would not have the same tendency to lapse into Spanish inadvertently"). *Cf. Saucedo v. Bros. Well Serv.*, 464 F. Supp. 919, 922 (S.D. Tex. 1979) (finding that "[an English-only] rule . . . obviously has a disparate impact upon Mexican-American employees. Most Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job").

195. The majority rule concludes that while monolingual and limited English proficiency employees might be able to bring a disparate impact claim against an English-only workplace rule, "fully" bilingual employees never can.

particularly when the opinion is grounded in an “ability to comply” rationale.

D. *Code Switching: Consequences and the Majority’s Crippling Burden of Proof*

Without ever mentioning code switching directly, the *Spun Steak* court found the consequences for bilingual Hispanic employees to be insignificant.¹⁹⁶ The court admitted that the question of a bilingual speaker’s inability to control which language is used in a given situation “is a factual issue that cannot be resolved at the summary judgment stage.”¹⁹⁷ Nevertheless, the *Spun Steak* majority voted to grant summary judgement to the defendants by finding that an employer’s English-only rule “merely inconvenience[s]” bilingual employees, because having “to catch himself or herself from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity.”¹⁹⁸

Professor Alfredo Mirande has suggested that the analysis of the leading opinions mirrors the “dominant” understanding of bilinguals as two monolinguals in one person.¹⁹⁹ According to this cumulative concept of language ability, being bilingual is merely an extension of being monolingual, and bilingualism is likened to a faucet with hot and cold spigots that can be turned on and off at will.²⁰⁰ In the early literature, code switching was described as either linguistic interference or as a transitional phase from the regular use of one language to the use of another.²⁰¹ This helps to clarify the majority’s belief that it is merely inconvenient for “fully” bilingual persons to refrain completely from speaking their primary language for long periods at work, even when surrounded by other members of their (minority-language) community. Similar to the dominant model, the *Spun Steak* majority seemed to consider fully bilingual persons as either those who have already made the transition from the less adept stages of bilingualism or who, under an interference theory, are having some trouble making the transition and may even benefit from the discipline of an English-only rule. The thinking seems to be that code switching is a phase that bilinguals will pass out of, as long as they keep at it.²⁰²

Alternatively, recent analysis recognizes the utility of code switching for

196. *Spun Steak*, 998 F.2d at 1488. In addressing the plaintiffs’ claim that “for them, switching from one language to another is not fully volitional,” the court distinguished between a rule that “merely inconvenience[s]” some employees and “those policies that have a significant impact.” *Id.*

197. *Id.*

198. *Id.*

199. *Supra* note 180.

200. *Id.*

201. *Id.* at 140 (citing U. WEINRICH, *LANGUAGES IN CONTACT* 1 (1968)).

202. One problem with this dominant model is that it does not accurately describe the experience of the great majority of “fully” bilingual national origin minorities. Often they have learned both their primary and secondary languages concurrently, or, if not, while still very young, and there has been no transitional learning phase. This undercuts the cumulative concept of the traditional view.

bilinguals.²⁰³ Both the Supreme Court and the scientific literature have acknowledged that bilingual speech is a more complex phenomenon than previously understood.²⁰⁴ Rather than linguistic interference, code switching has been described as “linguistic adaptation by bilingual speakers” with its own “subset of grammatical rules or knowledge that permits bilinguals to code switch effectively.”²⁰⁵ Rather than a transitional phase, code switching is better understood as an alternative set of practices for language use by bilinguals, and perhaps their most effective means of communication, particularly when speaking with other bilinguals.²⁰⁶ This helps to clarify the minority/EEOC position that the courts should require businesses to articulate a valid business justification for a rule that severely limits the ability of many bilinguals to speak their most effective “dialect” on the job.²⁰⁷ If one considers that monolingual Anglo employees continue to enjoy the privilege of conversing in their most effective language, the majority rule begins to look like “exactly the sort of preferential treatment [for the majority] that the Act meant to eliminate.”²⁰⁸

For bilinguals, the disparity in workplace privileges imposed by an English-only rule has consequences that reach far beyond the “mere inconvenience” of having to check their natural instinct to combine both English and their primary language in their conversations. A brief synopsis of the case law demonstrates that bilinguals are often “subject to reprimand and adverse employment decisions when attempting to communicate in an ‘English-only’ workplace.”²⁰⁹ In both *Saucedo* and in *Gloor*, prototypical code-switching incidents resulted in termination of employment for the bilingual employees.²¹⁰ In fact, in *Saucedo*

203. *Supra* note 180 and accompanying text.

204. *Hernandez v. New York*, 500 U.S. 352, 370 (1991) (finding that “the term bilingual does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions.”); Mirandé, *supra* note 19, at 94-5 (surveying the scientific literature and concluding that bilinguals who code switch are combining two languages “in a complex and unique communicative process that cannot be classified clearly as [one language or the other]”).

205. Mirandé, *supra* note 179, at 141.

206. An early study found that while some information is readily accessible in either language, the accessibility of certain information (in this study, words referring to abstract concepts like “justice, wisdom and freedom”) is linked to the language by which it was stored in the mind. Mirandé, *supra* note 179, at 137 (citing Paul A. Kolers, *Bilingualism and Information Processing*, 218 SCI. AM. 78 (1968)). This suggests a significant disparity between a native English speaker and a bilingual national origin minority’s opportunity or “privilege” to engage in conversation on the job, without perhaps reverting to their primary language, and facing the consequences.

207. It is important to recall that under the *Gloor-Spun Steak* majority rule, a business’s rationale for an English-only workplace rule can be completely arbitrary, because the majority finds that such a rule imposes no significant impact upon bilingual national origin minorities.

208. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (noting that “the objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees”) (emphasis added).

209. See Behm, *supra* note 12, at 595.

210. See Sections II.A–II.B *supra*. Although the trial court found that Garcia was fired (primarily) for deliberately speaking Spanish on the job, in purposeful violation of the company’s English-only rule, Garcia had testified that “he found the English-only rule difficult to follow.” *Garcia v. Gloor*, 618

the consequences reached beyond even Saucedo getting fired, to his Hispanic colleague, who was beaten when he protested Saucedo's firing and the rule. In *Premier Operator Services*, the consequences of an English-only rule had an institutional disparate impact upon language minorities, as thirteen Hispanic employees were fired and replaced within three months with fourteen Anglo employees.²¹¹ The *Spun Steak* majority dismissed as "conclusory" plaintiff's evidence of demeaning and humiliating consequences for violating that company's English-only rule.²¹² Testimony from the *Synchro-Start* decision showed how the benign use of a foreign language at work is treated analogously to exposure to second-hand cigarette smoke, whose effects have been demonstrated to be far from benign.²¹³ However, these types of incidents recur with disheartening frequency in workplace English-only cases.²¹⁴ Nevertheless, the *Gloor-Spun Steak* majority rule insists upon a fact-specific inquiry in every instance and rejects the EEOC's findings and its presumption of impact.²¹⁵

Behind the leading opinions' unwillingness to examine the subtleties of bilingual populations appears to be the distinctions they are (implicitly) making between discrimination in hiring or promotion and an employer's ability to manage their workplace.²¹⁶ While it is clear that Congress intended some type of balance between a business' ability to manage their own affairs and discriminatory behavior in their employment practices, the plain language of the statute, of course, makes no such distinction in including "terms, conditions or privileges" in the same prohibition as rules on hiring and promotion.²¹⁷ In fact, the Supreme Court has identified the phrase "terms, conditions and privileges" as "an expansive concept" that evinces Congress' "intent to strike at the full

F.2d 264, 266 (5th Cir. 1980).

211. See *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1069 (N.D. Tex. 2000).

212. See Chen, *supra* note 6, at 162-63 (internal citations omitted). The plaintiffs reported that the owner "screamed at" his bilingual employees in front of other employees for speaking Spanish and told one of them to "go back to your own country" if she wanted to speak Spanish. They also reported that the owner accused another bilingual employee, once again in the presence of her colleagues, of deliberately influencing another Hispanic employee to speak Spanish, even though their conversation was private and the other employee was significantly less proficient in English. The two named plaintiffs in the class action had been separated and not permitted to work near each other for two months after violating the English-only policy.

213. *Premier Operator Servs.*, 113 F. Supp. 2d at 1069.

214. See, e.g., Associated Press, *Housekeepers Told to Speak Only English Get Settlement*, N.Y. TIMES, Apr. 22, 2001, at A24 (reporting that a supervisor of the housekeeping staff at a private university "routinely called [her subordinates] 'dumb Mexicans' . . . [and the housekeepers] were hit and their hair and their ears were pulled" but "the supervisor became most angry when the housekeepers spoke Spanish").

215. *Garcia v. Spun Steak*, 998 F.2d 1480, 1486-89 (9th Cir. 1993).

216. See, e.g., *id.* at 1489-90 (rejecting the EEOC's Guidelines on National Origin Discrimination, the court relied on the statement of Congressman McCulloch that "management prerogatives and . . . [the] internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices"). Statement of William M. McCulloch, et al., H.R. REP. NO. 914 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2516.

217. 42 U.S.C. § 2000e-2(a)(1) (2001).

spectrum of disparate treatment.”²¹⁸ There is no indication that discrimination in these areas of employment should be taken any less seriously than in hiring and promotion.

In accord with this excessive deference to business prerogatives, the majority rule requires an exceedingly high burden of proof for a plaintiff’s cause of action based upon discrimination in their “terms, conditions and privileges” of employment.²¹⁹ However, given the evolving understanding of bilingual language practices and capabilities, the majority analysis is mistaken. The Supreme Court has indicated that changes in relevant facts or intervening scientific knowledge should prompt a reconsideration of precedents that rely on those facts.²²⁰ The courts would do well to re-examine English-only workplace rules and their full actual impact on bilingual national origin minorities.

E. *The Case for Deference to the EEOC Guidelines*

Contrary to the majority view of bilingual national origin minorities and the discriminatory impact of English-only workplace rules, the EEOC Guidelines presume that such a rules can “create an atmosphere of inferiority, isolation and intimidation based on national origin.”²²¹ The more recent understanding of bilingual national origin minorities and the code switching phenomenon supports the EEOC’s broader interpretation of national origin that includes one’s primary language as “an essential national origin characteristic.”²²²

Nevertheless, the *Spun Steak* majority explicitly rejected the Guidelines, reasoning that “it is clear that Congress intended a balance to be struck in preventing discrimination and preserving the independence of the employer,”

218. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1985).

219. The *Spun Steak* majority admitted that, it is “often difficult to compile” the requisite statistics to prove a prima facie disparate impact case even for the more typical claim of discrimination in hiring or promotions. *Spun Steak*, 998 F.2d at 1486. However, the *Spun Steak* majority conceded that “when the alleged disparate impact is on . . . privileges of employment,” a plaintiff’s prima facie case “may depend on subjective factors, not easily quantified,” making the proof seemingly even more difficult. *Id.* Nevertheless, the majority insists that this “does not relieve the plaintiff of their burden to *prove* disparate impact.” *Id.* (emphasis added). The court then proceeds to lay out a four-part test that would almost seem to require the use of statistical evidence.

The court also rejects the EEOC’s findings, requiring an employer to offer up a valid business justification for imposing an English-only rule, because they believe that a “fact-specific” inquiry is required each time that an employee claims disparate impact because of such rule.

220. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion) (suggesting that overruling can be appropriate when “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”) (emphasis added); see also *Kapche v. City of San Antonio*, 176 F.3d 840, 847 (5th Cir. 1999) (vacating a district court’s grant of summary judgment based upon prior case law when the appellate court found that drivers with insulin-dependent diabetes should not be deprived a license, as a matter of law, because of new treatment methods and more recent empirical data showing that such drivers “pose no greater threat than do drivers without the disease”).

221. 29 C.F.R. § 1606.7(a).

222. *Id.*

which they claimed the Guidelines did not do.²²³ The court reasoned that the EEOC's Guidelines contravened Congressional intent in presuming that the mere existence of an English-only workplace rule was enough to satisfy the plaintiff's burden to demonstrate disparate impact.²²⁴ Judge Boochever, in his dissent, found no "compelling indications that [the Guidelines are] wrong."²²⁵ The amount of deference that is due to the EEOC's Guidelines is a significant factor in the disagreement between the majority rule that rejects the Guidelines, and the emerging minority rule that relies on them.

The Supreme Court has instructed that when a statute is silent or ambiguous on an issue, a court should defer to the interpretation by the agency responsible for enforcing the act, if that interpretation is "based on a permissible construction of the statute."²²⁶

While the EEOC Guidelines on National Origin Discrimination²²⁷ are not administrative regulations, promulgated pursuant to formal procedures established by Congress,²²⁸ they do constitute "[t]he administrative interpretation of the [Equal Employment Opportunity] Act by the enforcing agency."²²⁹ Consequently, they are "entitled to great deference, " in the absence of "compelling indications that [they are] wrong."²³⁰

The Supreme Court has also established a fairly extensive set of criteria for courts to use in evaluating whether (EEOC) agency guidelines are based on a permissible construction of an Act.²³¹ In *General Electric v. Gilbert*, the Court announced that the level of deference "will depend upon the thoroughness evident in [the Agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if not to control."²³² In addition, the Court has found that such guidelines are generally entitled to greater deference where Congress knew of the interpretation, but left it intact while amending other aspects of the relevant statute.²³³

223. *Spun Steak*, 998 F.2d at 1490.

224. *Id.*

225. *Id.* (Boochever, J., dissenting) (quoting *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93 (1973)).

226. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984).

227. 29 C.F.R. § 1606.

228. See Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1551-52 (1999) (noting that with regard to Title VII, Congress specifically did not grant the EEOC the authority to promulgate regulations with the force of law). Under 42 U.S.C. § 2000e-12(a), the EEOC was only given authority to issue "suitable interpretive or procedural guidelines." See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

229. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

230. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93 (1973).

231. See generally *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

232. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

233. See *United States v. Rutherford*, 442 U.S. 544, 554 (1979).

The *Spun Steak* majority's rejection of the EEOC's Guidelines is fatally flawed for a number of reasons. First, while imposing a particularly daunting four-part test on the plaintiffs to prove their *prima facie* case,²³⁴ the court itself simply ignored the Supreme Court's four-part *Gilbert* test that would have indicated how much deference the *Spun Steak* court should have given to the EEOC Guidelines.²³⁵ In fact, the majority's entire analysis that there were "compelling indications" that the EEOC's Guidelines on English-only workplace rules were wrong, took less than one page.²³⁶ As Judge Boochever indicated in dissent, while the majority may disagree with the EEOC's position as a matter of policy, they demonstrated little in the way of compelling indications that the EEOC Guidelines are manifestly mistaken in interpreting the Act.

By contrast, the EEOC Guidelines satisfy all of the Supreme Court's *Gilbert* criteria, as a number of commentators pointed out in the wake of the *Spun Steak* decision.²³⁷ The thoroughness of the Commission's consideration is evident in the comprehensive process followed by the Commission in adopting the Guidelines.²³⁸ As Edward Chen has pointed out, thoroughness of consideration is also demonstrated by the comprehensive compliance manual that the Commission published, detailing procedures on how to investigate English-only workplace rules and discussing theories of discrimination and language rights issues.²³⁹

Furthermore, the validity of the Commission's reasoning that English-only workplace rules tend to create "an atmosphere of inferiority, isolation and intimidation" is demonstrated by the potential "pernicious and coercive effect" of such rules on national origin minorities.²⁴⁰ Finally, both earlier and later pronouncements of the Commission have been consistent with the Guidelines.

There seems to be no reason for the *Spun Steak* court not to have utilized the *Gilbert* standards if they were intent on rejecting the Guidelines. It is true that the Supreme Court has split over which set of criteria courts should use in

234. See *supra* note 119.

235. See *supra* note 232 and accompanying text.

236. See *Spun Steak*, 998 F.2d at 1489-90.

237. See, e.g., Chen, *supra* note 6, at 181-84 (determining that "[i]n rejecting the Guidelines, the panel in *Garcia* ignored specific factors the Supreme Court has identified as relevant in evaluating administrative interpretations by the EEOC"); Todd Kolarik, Note, *Garcia v. Spun Steak Co.: Disparate Impact Plaintiffs Challenging Speak-English-Only Rules Under a "Hostile Environment" Theory Must Prove Actual Adverse Impact*, 26 U. TOL. L. REV. 655, 685-89 (1995).

238. In response to its request for public review and comment of its proposed revision to the Guidelines, the Commission received approximately 250 comments from individuals, civil rights organizations, business associations, educational institutions, and public and private employers. As the Commission noted, much of the commentary was directed at § 1606.7, the section of the Guidelines that specifically addressed English-only workplace rules. The Commission also consulted with representatives from the federal government on the revision of the guidelines. It then classified and considered all comments, responded to recurring criticisms raised, and revised the Guidelines accordingly. 45 Fed. Reg. 62,728.

239. See Chen, *supra* note 6, at 182-83 (citing 2 EEOC Compl. Man. (CCH) ¶¶ 4001-35).

240. *Id.* at 183; see also notes 211-216 *supra* and accompanying text.

evaluating the EEOC's Guidelines in a given circumstance. However, the other standard that members of the Court have considered is *less stringent* than the *Gilbert* standard, and requires that the Guidelines "need only be reasonable to be entitled to deference."²⁴¹ Under either standard, the findings and analysis of the Guidelines deserve greater deference.

Next, the *Spun Steak* majority claims that they "are not aware of . . . anything in the legislative history to Title VII [that] indicates [support for the EEOC position]."²⁴² However, just two years earlier, Congress had passed the Civil Rights Act of 1991 and, *inter alia*, had specifically amended Title VII with regard to its disparate impact standard.²⁴³ In an exchange between Senator DeConcini and Senator Kennedy, the former stated his concern, for the record, that a number of his constituents had been subjected to "non-job related discipline and termination" as a result of English-only workplace rules.²⁴⁴ Both agreed that the EEOC Guidelines were a "sound and effective method for dealing with the problem" and that the Guidelines would be consistent with Title VII, as amended.²⁴⁵ Significantly, the Supreme Court has held that such interpretative guidelines are generally entitled to even greater deference where there is evidence that Congress knew of the interpretation, but left it intact while amending other aspects of the relevant statute.²⁴⁶

Finally, the *Gloor-Spun Steak* majority rule will create perverse incentives that violate Congress' intent in passing Title VII. Under the majority rule, "fully" bilingual employees never have a cause of action against an employer since, under a *Gloor-Spun Steak* analysis, an English-only rule never impacts bilingual national origin minorities (or else any impact is insignificant).²⁴⁷

241. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259-260 (1991) (Scalia, J., concurring) (quoting EEOC v. Commercial Office Paper Prods. Co., 486 U.S. 107 (1988)).

242. Garcia v. Spun Steak, 998 F.2d 1480, 1490 (9th Cir. 1993).

243. See generally Michael F. Patterson, Note, Garcia v. Spun Steak Company: *English-Only Rules in the Workplace*, 27 ARIZ. ST. L.J. 277, 289 (1995).

244. 137 CONG. REC. 15,489 (1991).

245. *Id.* Consider the following excerpt of the interchange:

Mr. DeCONCINI. Many of my constituents have brought to my attention an increasing problem with nonjob [sic] related discipline and termination of people for speaking languages other than English in the workplace. Is the Senator aware of the EEOC regulations dealing with this problem? Mr. KENNEDY. Yes, the EEOC promulgated such regulations in 1980. Mr. DeCONCINI. These regulations reflect the fact that the primary language of an individual is often an essential national origin characteristic. Does the Senator agree that these regulations found in 29 CFR 16067.7 [sic, 1606.7] provide a sound and effective method for dealing with this problem? Mr. KENNEDY. Yes, I agree that this regulation has worked well during the past 11 years it has been in effect. Mr. DeCONCINI. Does the substitute to § 1745 in any way adversely affect the EEOC regulation on language use in the workplace. [sic, "??"] Mr. KENNEDY. No, it does not. Mr. DeCONCINI. Therefore, if [the bill] is passed and signed into law by the President, the EEOC regulations would be consistent with title VII as amended by § 1745.

Id.

246. United States v. Rutherford, 442 U.S. 544, 554 (1979).

247. *Spun Steak*, 998 F.2d at 1490.

However, this creates an incentive for employers never to offer a business justification for an English-only rule. Any business rationale offered for such a rule may expose them to charges of intentional discrimination, specifically based upon the justification for the rule. The legally savvy employer, who may have to hire some national origin minorities less proficient in English but who wants to institute an English-only rule, has an incentive to hire those applicants most proficient in English, regardless of the need for the position. They would then have a ready-made argument that his or her employees are certainly proficient enough to "choose to" abide by the rule.²⁴⁸ This type of outcome lends support to the argument that the majority rule does not address "the real menaces" that Title VII "should address in English-only cases: over broad employment policies, discriminatory implementation of workplace rules, the unnecessary use of English-only policies where less-discriminatory alternatives exist, and the use of facially-neutral rules to mask intentional discrimination."²⁴⁹

Admittedly, the majority rule may protect private employers from at least the possibility of an EEOC hearing, if not a lawsuit. However, the requirement of a business rationale under an EEOC-type rule achieves three ends that are consonant with Congress' intentions in passing Title VII. The necessity to articulate a business justification encourages employers to more thoroughly consider their motivations for instituting an English-only rule. In the same context, employers would be more likely to consider whether their purposes could be achieved with a less sweeping or intrusive rule. Finally, the need to justify such a rule would act as an incentive to employers to work more closely with their diverse employment force in fashioning rules that create an harmonious workplace. These types of incentives are certainly closer to Congress' Title VII objectives of "assur[ing] equality of employment opportunities and . . . eliminat[ing] those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"²⁵⁰ while also allowing "management prerogative . . . to be left undisturbed . . . except to the limited extent that correction is required in discrimination practices."²⁵¹ Because the EEOC method of analysis offers an opportunity to set incentives that more accurately fulfill Congress' objectives, the Guidelines deserve a great deal more deference from the courts than they have received up to now.

IV. CONCLUSION

English-only workplace rules have important social and legal implications. Given the increasingly diverse character of our nation's workplaces, disputes over English-only rules are likely to become more frequent. Additionally, al-

248. Of course, such motives may be acting more at the margins than is portrayed here.

249. Patterson, *supra* note 226, at 290 (citing 2 EEOC Compliance Manual).

250. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

251. *Spun Steak*, 998 F.2d at 1489.

Spanish as Second-Hand Smoke

though most cases up to now have involved Latino employees, the issue has wide-spread ramifications affecting all bilingual workers.²⁵²

Significant numbers of new entrants to America's labor force speak a language other than English as their primary language. They can generally be expected to speak their primary language to their fellow employees who are members of their own ethnic group. Additionally, monolingual employers and supervisors can generally be expected to continue to want to restrict the use of other languages in the workplace.

The courts' essential misunderstanding of the language characteristic for bilingual national origin minorities will continue to expose them to significant harm based on their often-inadvertent tendency to use both languages interchangeably. The courts would do better to rely on the recognized expertise of the EEOC and defer to their Guidelines in this area of crucial public policy.²⁵³

252. See Chen, *supra* note 6, at 159 (noting that Asian and Pacific Islanders have brought several challenges to Speak-English-Only rules, including *Dimaranan v. Pomona Valley Hosp. Medical Ctr.*, 775 F. Supp. 338 (C.D. Cal. 1991), which was settled while an appeal was pending in the Ninth Circuit).

253. Congress has recognized the unique expertise of the EEOC in the area of employment discrimination. H.R. REP. NO. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2146 ("Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases.").

